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No. 93-60

In the Supreme Court of the United States

OCTOBER TERM, 1993

BART H. DYE, ET AL., PETITIONERS

v.

MIKE ESPY, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the sovereign immunity of the United States bars an award of damages for compensatory civil contempt against officers of the United States in their official capacities.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-24) is reported at 986 F.2d 1184. The opinion of the district court (Pet. App. 25-45) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 1993. A petition for rehearing was denied on April 5, 1993. Pet. App. 46. The petition for a writ of certiorari was filed on July 6, 1993 (a Tuesday after a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This litigation arises out of a nationwide class action that challenged the procedures followed by the Farmers Home Administration (FmHA) in collecting on delinquent loans. In response to that class action, the United States District Court for the District of North Dakota issued a 1984 injunction that required the FmHA to provide farmers who default on their loans a notice of options available to them under certain programs before accepting a voluntary conveyance of the collateral for the farmers' loans. The FmHA subsequently promulgated certain regulations intended to address the problem, but the district court held some of the new regulations invalid. Before the Eighth Circuit resolved the parties' challenges to the district court's ruling, Congress enacted the Agricultural Credit Act of 1987, Pub. L. No. 100-233, 101 Stat. 1568, which expressly resolved the questions in dispute in the case. The Eighth Circuit accordingly remanded the matter to the district court with instructions that it dismiss the action as moot. See Pet. App. 8-10.

2. Petitioners are farm owners who filed two complaints in the district court contending that the FmHA had violated the injunction by accepting voluntary conveyances of their farms before the injunction was vacated, without giving them the notices required by the injunction.[1] The district court dismissed the complaints. Pet. App. 25-45. The court rejected the government's argument that the relief sought by petitioners was

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[1] In the lower courts, their complaints were consolidated with a similar case filed by Leonard and Audrey Doran, who contended that they lost their farm through foreclosure as a result of the FmHA's failure to comply with the injunction. See Pet. App. 12. The Dorans did not join in the petition and thus are respondents in this Court under Rule 12.4.

barred by sovereign immunity (*id.* at 28-34), but nevertheless dismissed the action as moot (*id.* at 35-44). Reasoning that civil contempt actions do not survive dismissal of an underlying injunction that is the basis for the contempt action, the court concluded that dismissal of the underlying class action required dismissal of these cases as moot. *Id.* at 38-44.

3. The court of appeals affirmed. Pet. App. 1-24. The court of appeals first rejected the district court's conclusion that the contempt actions could not survive dismissal of the underlying class action, stating that civil contempt actions abate only "if the underlying injunction is vacated because it was issued erroneously," *id.* at 16. Because the injunction here was vacated upon issuance of an Act of Congress that resolved the dispute, rather than by an appellate decision overturning the injunction, the court concluded that the contempt actions remained justiciable. *Id.* at 16-17.

The court nevertheless dismissed the actions as barred by sovereign immunity. Pet. App. 17-23. The court started from the twin premises that the actions are "in actuality actions against the United States government * * * [because they] seek to compel the government to take certain steps to compensate [petitioners] for their losses," *id.* at 13, and that "[t]he United States can only be sued when it has expressly given its consent to be sued," *id.* at 14. The court then noted that the general contempt statute, 18 U.S.C. 401, does not expressly provide for contempt actions against the federal government, and that its earlier decision in *McBride* v. *Coleman*, 955 F.2d 571 (8th Cir.), cert. denied, 113 S. Ct. 65 (1992), had concluded that sovereign immunity barred an award of compensatory damages against the federal government in a civil contempt action. Pet. App. 17-21. Accordingly, the court reasoned, the doctrine of sovereign immunity barred the action.

Id. at 22. The court commented that the case "essentially [is] a tort action," which is the subject of the limited remedy provided under the Federal Tort Claims Act. *Ibid.* Hence, the court concluded that it was not "within our power to allow [petitioners] to proceed with these compensatory civil contempt proceedings and to circumvent the strictures of the Federal Tort Claims Act which Congress specifically provided for this type of relief." *Id.* at 23.

ARGUMENT

Petitioners contend that the court of appeals erred in concluding that sovereign immunity bars their civil contempt actions against the federal government. That claim does not warrant review.

1. It is axiomatic that "[w]aivers of the Government's sovereign immunity, to be effective, must be '"'unequivocally expressed.'"'" *United States* v. *Nordic Village, Inc.*, 112 S. Ct. 1011, 1014 (1992) (quoting *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 95 (1990), quoting *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980), quoting in turn *United States* v. *King*, 395 U.S. 1, 4 (1969)). Petitioners do not challenge the court of appeals' conclusion that the relief sought in this case is in substance relief against the United States. Nor do they challenge the court of appeals' conclusion that the statute authorizing the federal courts to issue judgments of contempt does not unequivocally provide for suits against the United States.

Instead, petitioners rely (Pet. 11-12) on the "inherent authority" of the courts.[2] But reliance on "inherent au-

[2] Petitioners also make a passing reference (Pet. 10) to the Administrative Procedure Act. But petitioners did not make any claim under the Administrative Procedure Act in either of the lower courts, except for a belated and passing reference to the APA in their reply brief in the court of appeals. See Appellant's

thority" simply ignores the undisputed rule that federal courts cannot adjudicate suits against the United States where Congress has not waived sovereign immunity. This Court's repeated and emphatic statements of that rule make it clear that any "inherent authority" of the federal courts does not extend to the issuance of judgments against the United States in the absence of some statutory authorization.[3]

The only other court of appeals to address the question has agreed with the Eighth Circuit's conclusion that sovereign immunity bars compensatory civil contempt actions against the United States. See *Barry* v. *Bowen*, 884 F.2d 442, 443-444 (9th Cir. 1989) (holding that sovereign immunity bars contempt actions against the federal government for damages). The court of appeals' agreement with that precedent does not warrant review by this Court.

2. Petitioners claim that the decision of the court of appeals conflicts with two old decisions of the Fifth and Seventh Circuits. Pet. 9 (citing *Norman Bridge Drug Co.* v. *Banner*, 529 F.2d 822 (5th Cir. 1976); *Nelson* v. *Steiner*, 279 F.2d 944 (7th Cir. 1960)). But neither of those courts addressed the question presented here, and

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C.A. Reply Br. 8-9. See also Motion by Carl and Judie Saine to Find Contempt (Feb. 2, 1990); Statement of Responsible Parties and Statement of Proposed Relief [of Petitioner Bart H. Dye] (May 9, 1986). Because neither of the courts passed on any such claim, that reference does not provide a basis for review by this Court. See, *e.g.*, *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984); *Demarest* v. *Manspeaker*, 498 U.S. 184, 188-189 (1991).

[3] Petitioners' reliance (Pet. 12) on *Spallone* v. *United States*, 493 U.S. 265 (1990), is misplaced, because that case involved the immunity of local government officials from damages imposed under a federal statute. Hence, the rule requiring clear waivers of the federal government's sovereign immunity was wholly inapplicable.

only in the *Norman Bridge* case would the question even have been relevant.[4] In *Norman Bridge*, the Fifth Circuit affirmed a joint $500 contempt fine issued against the Drug Enforcement Administration, its Director, and an agent who disobeyed a temporary restraining order issued by a federal district court. Because the opinion does not indicate that the individuals were sued in their official capacities, it is not clear that the judgment required any expenditure of funds by the United States itself. The court's opinion cannot serve as a strong precedent for such an order, because the section of the opinion

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[4] *Nelson* involved $400 fines issued against two individual employees of the federal government. The opinion does not suggest that the fines were issued against the employees in their official capacities and does not refer to the doctrine of sovereign immunity. The only indication that the federal employment status of the contemnees was relevant appears in the court's rejection of the argument that they could defend the contempt citations by arguing that they were following "instructions of superior authority." 279 F.2d at 948. The argument that reliance on federal authority is a defense on the merits to a suit against an individual is quite different from the argument that a suit against the federal government itself is barred.

The Seventh Circuit's only subsequent citation of *Nelson* in a published opinion, *United States* v. *Board of Education*, 744 F.2d 1300, 1308 (1984), cert. denied, 471 U.S. 1116 (1985), supports a limited view of *Nelson*. In that case, the court cited *Nelson* in support of the suggestion that an appropriate civil contempt citation against the federal government would have "ordered the government either to refrain from specific efforts to make * * * funds unavailable to the [plaintiff] or to inform Congress about the funding obligations of the government under the Decree." 744 F.2d at 1308. If, as petitioners contend, *Nelson* stands for the proposition that district courts can go much farther and impose direct monetary sanctions against the federal government, there would be no reason for the court to suggest that the district court take the limited step of ordering the government to inform Congress of funding requirements imposed by the district court's underlying order.

considering the propriety of a contempt order (529 F.2d at 827-828) does not refer at all to the presence of the United States as a party or to the problem sovereign immunity might pose for such a suit. Hence, there is little reason to believe that either of the cases on which petitioners rely would be treated as binding precedent on the question presented by the petition, even by the courts that issued those opinions.[5]

The likelihood that the Fifth and Seventh Circuits would treat the older decisions as having decided the question at hand is considerably diminished by this Court's recent emphasis on the limitations of the authority of federal courts to issue monetary awards against the United States in the absence of statutory authority. See, *e.g.*, *OPM* v. *Richmond*, 496 U.S. 414, 428 (1990); *Nordic Village*, *supra*; *Ardestani* v. *INS*, 112 S. Ct. 515, 521 (1991). In our view, it is quite likely that those decisions, together with the reasoned opinions of the Eighth Circuit in this case and the Ninth Circuit in *Barry* v. *Bowen*, 884 F.2d 442, 443-444 (1989), would at least cause the Fifth and Seventh Circuits to consider the question an open one. If those courts were to adopt the position espoused by petitioner, review might be appropriate at

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[5] To our knowledge, no published opinion of a federal appellate court has cited the relevant portion of the *Norman Bridge* case. The only published appellate opinions of which we are aware that cite the relevant portion of *Nelson* are the Seventh Circuit's decision in *United States* v. *Board of Education*, 744 F.2d 1300, 1308 (1984) (discussed in note 4, *supra*), cert. denied, 471 U.S. 1116 (1985), and the various Eighth Circuit opinions related to the class action that led to this case. See *Hartman* v. *Lyng*, 884 F.2d 1103, 1107 n. 3 (1989); *McBride* v. *Coleman*, 955 F.2d 571, 582 (Lay, C.J., dissenting), cert. denied, 113 S. Ct. 65 (1992). As this case indicates, the Eighth Circuit has accepted the government's view of the question.

that time. As matters stand now, however, there is no need for review by this Court.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] In any event, this case would be a poor vehicle for considering the question, because the judgment of the court of appeals could be affirmed without reaching the question presented by the petition on the alternate ground that petitioners' civil contempt motions abated as a matter of law upon dismissal of the underlying injunction. The court of appeals' contrary conclusion is at best difficult to reconcile with the well settled rule that, in federal court, "[a] civil contempt proceeding becomes moot upon termination of the underlying controversy that gave rise to the litigation from which it stemmed." 3 Charles Alan Wright, *Federal Practice and Procedure: Criminal* § 705, at 830 (2d ed. 1982); see, *e.g.*, *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 451-452 (1911).